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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-62

HUBERT WHEELER, individually and in his capacity as former Commissioner of Education, *et al.*,

Petitioners,

vs.

ANNA BARRERA, individually and as Next Friend for JOANNA BARRERA, PATRICIA BARRERA, DIANA BARRERA and MARIA BARRERA, minors, *et al.*,

Respondents.

BRIEF OF AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, JEWISH LABOR COMMITTEE, JEWISH WAR VETERANS, NATIONAL COUNCIL OF JEWISH WOMEN, UNION OF AMERICAN HEBREW CONGREGATIONS and UNITED SYNAGOGUE OF AMERICA, *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

This proceeding raises questions concerning the interpretation and constitutionality of a subparagraph of Title I of the Federal Elementary and Secondary Education Act of 1965, 20 U.S.C. 241e(a)(2), which provides for certain benefits for nonpublic schools. Title I (20 U.S.C. 241a ff.) embodies a plan under which Federal funds are granted to local public educational agencies for the purpose of setting up programs to deal with the problems of "educationally deprived children." Paragraph (a)(2) of Section 241e provides that a local educational agency applying for such a grant must show that,

> to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; * * *

This suit was initiated in the U. S. District Court for the Western District of Missouri by a group of parents of children attending sectarian nonpublic schools, respondents here, who claimed that they were denied benefits to which they were entitled under the Act. They assert that, although the state educational authorities, petitioners here, have established various remedial and other programs in the public schools paid by Title I funds, they have declined to assign teachers, paid out of Title I funds, to perform the same functions in the church schools which their children attend. Petitioners, conceding the correctness of this allegation, contend (1) that Missouri law forbids assignment of Title I funded teachers to serve in religiously affiliated schools dur-

ing regular school hours; (2) that the state is prepared to and has made programs available to educationally deprived children in nonpublic schools in the form of programs on public school premises outside of regular school hours and during the summer; (3) that such programs constitute compliance with the requirement of Section 241e(a)(2); and (4) that, if that is not the case and the Act does require the assignment of teachers as demanded by respondents, it is to that extent invalid under the Religion Clauses of the First Amendment.

The District Court ruled in favor of the defendants on both the law and the facts. On appeal, the Court of Appeals for the Eighth Circuit, voting 2 to 1, reversed. It found that the refusal to permit Title I funds to be used to send teachers into the parochial schools violated the Act. It held, however, that it was unnecessary to pass on the constitutional question since no specific program was before it. It directed the District Court to enjoin petitioners from further violations.

Petitioners filed a petition for writ of certiorari, presenting both the statutory and the constitutional issue. They urged that the constitutional issue was properly before this Court because the Court of Appeals had in effect required petitioners to carry out a program of sending teachers on the public payroll into the parochial schools. This Court granted the petition.

Question to Which This Brief Is Addressed

Although the undersigned *amici* agree with petitioners that the District Court correctly construed Title I, this brief is addressed solely to the constitutional issue, as stated in the petition for certiorari:

If the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241e(a)(2), requires that, notwithstanding contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?

Interest of the *Amici*

This brief is submitted in behalf of the following national Jewish organizations:

American Jewish Congress
Anti-Defamation League of B'nai B'rith
Jewish Labor Committee
Jewish War Veterans
National Council of Jewish Women
Union of American Hebrew Congregations
United Synagogue of America

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that the program which respondents seek to effectuate, and which the court below approved, would be a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent. They believe further that the Jewish communi-

ties' close concern with this subject during the past decades enables it to contribute to the resolution of the specific issues before the Court in this case.

Summary of Argument

The decisions of this Court in 1971 and this year regarding governmental aid to sectarian schools establish that the First Amendment prohibits all procedures designed to supply significant amounts of such aid. The present proceeding is but another attempt to find a way around that prohibition. If this Court reaches the constitutional issue in this case, it should make it clear that the procedure invoked here is no more viable than those already condemned.

I. The sending of persons on the public payroll to teach in sectarian schools violates the First Amendment because it has neither a valid secular purpose nor a primary effect which does not advance religion. If it were allowed, there would be no effective limits on the extent to which governments might subsidize parochial schools. This is illustrated by the fact that recently enacted state legislation shows that this procedure is being resorted to widely to permit such subsidies.

A. The procedure in question has a sectarian purpose. Any possible educational purpose could be served by other procedures.

B. The procedure has a sectarian effect since it is a method by which the government can substantially subsidize the operations of sectarian schools.

II. The sending of persons on the public payroll to teach in sectarian schools violates the First Amendment because it fosters an excessive governmental entanglement with religion, both administrative and political.

A. The 1971 decisions of this Court on aid to parochial schools make it clear that, if the procedure here in question were approved, extensive administrative measures would have to be taken to insure that the operations of the teachers in question are entirely secular. In the face of the normal pressures upon those who teach in a religious school to conform to its policies and atmosphere, any such regulations and their administration would have to be so comprehensive as to entail an extreme degree of involvement of government officials in the affairs of the school. Although the teachers in question would be on the public payroll, it is not likely that they would operate as independent enclaves, subject to direction only by absent public officials.

B. The programs before the Court in both the 1971 decisions and the 1973 decisions were found to suffer from the flaw of political entanglement because of their necessary dependence on repeated applications to the legislatures which must make the necessary appropriations. That danger of entanglement exists here.

Argument

The present proceeding represents another effort to bring about large-scale governmental financing of schools maintained by religious institutions as part of their religious mission. It is thus a fresh attempt to overturn a constitutional precept that was taken virtually for granted for more than 150 years after adoption of the First Amendment—that the constitutional requirement of separation of church and state bars such financing. In the words of this Court in *Everson* v. *Board of Education*, 330 U.S. 1, 16

(1947): "No tax in any amount, large or small, can be levied to support any religious activities or institutions * * *."

In *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* 403 U.S. 602 (1971), this Court considered and rejected an effort to legitimize such financing by subjecting grants of aid to restrictions designed to assure that the aid went only to the secular aspects of the schools involved. The plans considered in those cases had plainly been devised on the assumption that there was no doubt as to the unconstitutionality of arrangements in which government funds or other benefits were used for the general operation of sectarian schools. It was apparently hoped that the separation requirement could be satisfied by insuring that the funds were not used for general operations. This Court nevertheless held that the plans violated the "entanglement" aspect of the three-way test which this Court has applied in its recent cases. As phrased in *Lemon* (403 U.S. at 612-13), it read:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 647.

With this approach blocked, resort was had to the opposite approach—the simple arrangement of giving religious schools government assistance without strings attached. This meant going back to the general form of financing which the earlier statutes were designed to avoid. That is what was attempted in the statutes which came before this Court at its last term. *Committee for Public Education and Religious Liberty* v. *Nyquist,* 93 S. Ct. 2955; *Sloan* v. *Lemon,* 93 S. Ct. 2982; and *Levitt* v. *Committee for*

Public Education and Religious Liberty, 93 S. Ct. 2814.[1] Reiterating its three-way test (93 S. Ct. at 2965), as well as the broad ruling in the *Everson* decision quoted above (*id.* at 2969), this Court found that that approach was likewise unconstitutional.

In thus closing off both routes around the constitutional barrier to governmental aid to sectarian schools, this Court gave full recognition to the complaint of supporters of such aid that they were faced with an "insoluble paradox." In its opinion in *Sloan*, it said (93 S. Ct. at 2988):

> But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: "Congress" and the States by virtue of the Fourteenth Amendment "shall make no law respecting an establishment of religion." With that judgment we are not free to tamper, and while there is "room for play in the joints," *Walz* v. *Tax Commission, supra*, at 669, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

There is nothing surprising about this result. It is merely a reflection of the historic principle that the Constitution bars government from resorting to any device to use its resources to finance religious schools.

In its decision in *Nyquist* (93 S. Ct. at 2959), this Court took occasion to say that it did not regard "Jefferson's metaphoric 'wall of separation' between Church and State" as having "become 'as winding as the famous serpentine wall' he designed for the University of Virginia." It also

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1. In the *Sloan* decision, it was noted that the provisions in the Pennsylvania statute there invalidated, which barred the state from supervision of the operations of the affected schools, embodied "an effort to avoid the 'entanglement' problem" (93 S. Ct. at 2985).

noted, at two points in its decisions that, when it upheld the use of state funds to provide transportation to parochial schools in the *Everson* case, it had characterized this arrangement as "approaching the 'verge' of impermissible state aid" (*Nyquist*, 93 S. Ct. at 2966; *Sloan*, *id.* at 2987).[2] It went on to say (at 2987):

> In *Lemon*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial support." • • • Again today we decline to approach or overstep the "precipice" of establishment against which the Religious Clauses protect. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.

With respect to *Everson* and two later decisions upholding the use of public funds for textbooks at parochial schools and construction at church-affiliated colleges (*Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)), it said (93 S. Ct. at 2967):

> These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. *But the channel is a narrow one, as the above cases illustrate.* (Emphasis supplied.)

We submit that, if this Court reaches the constitutional issue in this case, it should leave no room for doubt that programs under which teachers on the public payroll give instruction in religiously affiliated schools do not fit into that "narrow" channel.

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2. This language from *Everson* was similarly quoted at the beginning and again at the end of this Court's discussion of the constitutional issue in *Lemon*. 403 U.S. at 611-2, 624.

POINT I

If and to the extent that Title I permits or mandates sending personnel whose salaries are paid by the Federal Government to teach in religiously affiliated schools, it violates the Establishment Clause of the First Amendment because it has neither a valid secular purpose nor a primary effect which does not advance religion.

The decision below has the effect of requiring the defendant state school officials (petitioners here) to allow Title I funds to be used to send teachers into sectarian schools to give instruction on the premises of those schools. The Court of Appeals suggested no limitation on what could be taught under this arrangement or how much of the secular aspect of the operations of the affected schools could be thus supported. Hence, what the court mandated is, potentially at least, a procedure that could be used to provide massive government subvention of religious schools. In the words of this Court in *Nyquist* (93 S. Ct. at 2969): "It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny."

The possibilities of this arrangement may be seen in developments in Ohio since this Court's rulings of last June. That state adopted a statute in 1969 under which local school districts were given specified funds to be used to send teachers into parochial and other nonpublic schools. They were to supply what have come to be known as "auxiliary services," including "programs for the enhancement of instruction in secular courses required to be taught in nonpublic schools by minimum standards adopted by the state board of education * * *." Ohio Rev. Code Title 33, Section 3313.06. Thereafter, in December 1971, this statute

was replaced by another which used rather more limited language. It permitted the teachers to be used for various specifically named services, including "programs for the improvement of the educational and cultural status of disadvantaged pupils." *Id.* Section 3317.062. The 1973-74 session of the Ohio General Assembly financed this program in the amount of $3,259,000. Amended Substitute House Bill No. 86.

Meanwhile, litigation was pending concerning another aspect of Section 3317.062 which provided a program of tax credits for the parents of children in nonpublic schools. On December 29, 1972, a three-judge court held that program unconstitutional. *Kosydar* v. *Wolman*, 352 F. Supp. 744 (S.D. Oh. 1972). That decision was affirmed by this Court without opinion last June on the same day that it decided the *Nyquist* case. *Grit* v. *Wolman*, 93 S. Ct. 3062.

Thereupon, the Ohio General Assembly enacted House Bill 993, signed by the Governor on August 15, 1973, which appropriated an additional $81,456,090 to be used for the auxiliary services aspect of Section 3317.062.

Similar laws have been passed in other states. In New Jersey, a statute which provides a number of forms of aid to nonpublic schools includes grants directly to such schools for "supplies, instructional materials, equipment and auxiliary services * * *." New Jersey Stat. Ann. Title 28A, Sections 58-59 to 58-67. The term "auxiliary services" has administratively been given a rather restricted interpretation but it includes such things as "remedial and corrective instruction and diagnostic services in reading and mathematics." New Jersey Administrative Code, Section 6:8-1.3.

This and other aspects of the New Jersey statute have been found unconstitutional by a three-judge District Court.

Public Funds for Public Schools of New Jersey v. *Marburger*, —— F. Supp. ——, decided April 5, 1973 (U.S.D.C. N.J.). Despite the limited nature of the auxiliary services to be offered, the District Court held that the program violated the principles laid down in this Court's 1973 decisions. It found both that the statute had the improper effect of assisting religion and that it created undue entanglement between church and state. An appeal is pending in this Court. See 93 S. Ct. 2728, 3024.

In Illinois, a statute providing auxiliary services included, among other things, "Remedial and therapeutic programs for educationally disadvantaged children. * * *" (Public Act 77-1891). This provision, along with others, was held unconstitutional by the Illinois Supreme Court in *People ex rel. Klinger* v. *Howlett*, —— Ill. ——, decided October 1st, 1973.

A statute enacted in Pennsylvania is somewhat broader than the two just described. Pennsylvania Purdon's Stat. Title 24, Section 9-972. The term "auxiliary services" is there defined to include not only guidance, counseling, remedial and therapeutic services, but also "such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Plainly, this language could apply to all secular subjects. The statute has been challenged and the matter is now before a three-judge Federal District Court.

These statutes, and particularly the experience in Ohio, strongly suggest that, in the wake of this Court's decisions of last June, the auxiliary services procedure will be at least one of the devices used in the continuing effort to provide massive governmental financing of sectarian schools.

A. The Sectarian Purpose

In both its 1971 and its 1973 parochiaid decisions, this Court accepted declarations in the various state statutes before it that their provisions were designed to achieve specific secular purposes (*Lemon* case, 403 U.S. at 613; *Nyquist* case, 93 S. Ct. at 2966; *Sloan* case, 93 S. Ct. at 2985). Accordingly, it found that the statutes met the first part of the three-way test. Nevertheless, at various points in its 1973 opinions, it suggested that the statutes under review had the purpose of assisting religion. In discussing tax credits in *Nyquist*, it said that "their purpose and inevitable effect are to aid and advance * * * religious institutions" (93 S. Ct. at 2976). Again, in *Sloan*, it talked of the "intended consequences" of tuition reimbursement (93 S. Ct. at 2986; see also 2971). Thus, it appears that impermissible intent can be found from the nature of the program itself.

In the present case, there is no statutory declaration of purpose before the Court and it is therefore necessary to deduce the purpose from the program involved. Moreover, the purpose to be considered is not that of Title I generally or even the purpose of that portion of it, subparagraph 241e(a)(2), which requires some form of expenditure in behalf of children at nonpublic schools. It is rather the purpose of the program demanded by the parents of children in sectarian schools (respondents here) that the Federal funds in question be spent in a particular way; namely, by sending teachers into their schools. The purpose of such an arrangement can hardly be other than assisting those religious schools in carrying out their functions and assisting the parents in enabling them to obtain a religious education for their children.

Plainly, the purpose of respondents in demanding this particular arrangement and none other is religious rather than educational. *Education* is available to the children of those parents in the public schools. It is available also under the arrangements for spending Title I funds which the State has made or offered to make—including giving classes in public schools after hours or on Saturday. The reason for demanding that the instruction be given in the religious school is the overriding consideration—important to virtually all religious school authorities—that it is essential to keep the child in the religious atmosphere which they have created. That, however, is a religious, not an educative, value.

B. The Sectarian Effect

The main thrust of this Court's opinions in the 1973 parochiaid cases is that the Constitution prohibits any plan under which the government may "openly subsidize parochial schools" (*Nyquist* case, *supra*). That is the case here. The procedure urged by respondents could be used to subsidize most of the operations of a sectarian school.

The recent decisions also make it clear that the "primary effect" aspect of the three-way test does not mean exclusive or even predominant effect. They leave little room for doubt that a statute cannot be upheld if it has a substantial sectarian effect even though it also has a substantial secular effect. Thus, in *Nyquist*, this Court found it sufficient that the maintenance program had "a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools" (93 S. Ct. at 2966). This aspect of the ruling was highlighted by Justice White in his dissent where he

pointed out that the various New York programs undoubtedly had as one of their effects "preserving the secular functions" of the church-related schools (93 S. Ct. at 2998).

In sum, we submit that, even if the program of governmental support involved here could be conducted without impermissible entanglement, the point we discuss next, it fails under the secular effect test.

POINT II

If and to the extent that Title I permits or mandates sending personnel whose salaries are paid by the Federal Government to teach in religiously affiliated schools, it violates the Establishment Clause of the First Amendment because it fosters an excessive governmental entanglement with religion, both administrative and political.

A. Administrative Entanglement

The form of aid under review here is not markedly different from that which was condemned by this Court in the *Lemon* decision, particularly the arrangement in effect in Rhode Island under which the government paid part of the salaries of teachers in sectarian schools. Here it would pay the whole salary of teachers who, under the decision of the court below, would be sent to teach in sectarian schools.

In *Lemon*, this Court noted that the legislatures of both Pennsylvania and Rhode Island, recognizing the religious orientation of the schools involved, had created "statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former" (403

U.S. at 613). As to the Rhode Island law, it said that the fact that "parochial schools involve substantial religious activity and purpose" had "led the legislature to provide for careful governmental controls and surveillance by state authorities in order to insure that state aid supports only secular education" (403 U.S. at 616). While Title I does not contain the explicit provisions for "government controls and surveillance" included in the Rhode Island statute, there can be no doubt under the decisions of this Court that such controls would have to be imposed by regulation.

Thus, in *Lemon*, this Court said, concerning the Rhode Island statute there considered (403 U.S. at 619):

> The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

Yet it is questionable whether regulations could be drawn that would effectively counter the normal pressures upon those who teach in a school to conform to its policies and atmosphere. To be effective, the regulations and their administration would have to be so comprehensive as to entail an extreme degree of involvement of government officials in the affairs of the school. Indeed, it is this conflict —between the need to attach limitations and the entangling

effect of those limitations once they are attached—that creates the "insoluble paradox" referred to above which has the effect of barring all substantial government aid to sectarian schools.

A key aspect of the *Lemon* decision was its conclusion that it is difficult if not impossible to make sure that any particular teacher is refraining from sectarian activity, particularly in the atmosphere of a sectarian school. Distinguishing the decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), upholding the New York State law under which the state financed the lending of textbooks for use in nonpublic schools, this Court said (403 U.S. at 617) that "teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Hence, the "conflict of functions inheres in the situation." Noting that teachers in religious schools are under the direct supervision of a church, the Court said: "Religious authority necessarily pervades the school system" (*ibid*). Although a number of teachers had testified that they did not inject religion into their secular classes, the Court believed that the record suggested "the potential if not actual hazards of this form of state aid" (*id.* at 618). It found that the necessary supervision of the work of the teachers "will involve excessive and enduring entanglement between state and church" (*id.* at 619).

One of the factors considered significant by this Court in finding improper entanglement in the Rhode Island arrangement is absent here. The teachers whose salaries are paid out of public funds are, at least presumably, appointed

by public authorities rather than by those who operate the religious schools. Examination of the *Lemon* opinion, we submit, will show that the fact that the teachers were under the authority of the church was but one of a number of factors deemed significant by the Court. At least as important was the general religious atmosphere of the school, an essential aspect of sectarian institutions.

Furthermore, it is not in reason to assume that those responsible for the overall operation of a school, and particularly for its functioning as an agency for inculcation of a particular religion, will refrain altogether from seeking to influence what goes on in the classrooms. It is hardly likely that these Federally financed activities will operate as independent enclaves, subject to direction only by absent public officials. In *Lemon*, this Court pointed to "the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions" (403 U.S. at 619). The same kind of possibility exists here —that of friction over the degree of independence of the teacher.

We submit that there is no way in which this kind of program can be operated without falling afoul of the prohibition of administrative entanglement. And if it could, there would still be the prohibition of political entanglement, to which we now turn.

B. Political Entanglement

As we have seen, the statutes considered by this Court in the 1973 cases were designed so as to avoid if possible the flaw of governmental entanglement which had brought down the statutes considered in 1971. Consequently, the

administrative entanglement aspect of the three-way test did not figure prominently in the 1973 rulings. The political aspect of entanglement was, however, invoked.

In *Nyquist*, having found that all three of the challenged programs had "the impermissible effect of advancing religion," this Court said that it was unnecessary to consider whether they would result in entanglement of the state with religion in the sense of "continuing state surveillance" (93 S. Ct. at 2976). It said, however, that, "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carried grave potential for entanglement in the broader sense of continuing political strife over aid to religion" (*ibid*). The Court (at 2977) referred specifically to its statement in the *Lemon* case (403 U.S. at 623) that:

> The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow.

The Court noted (93 S. Ct. at 2977-8) that all three of the programs before it "start out at modest levels," but that experience showed that aid programs "tend to become entrenched, to escalate in cost, and to generate their own aggressive constituences * * *. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration."[3]

3. This factor was found to be applicable even to the tax relief aspect of the New York statute. This Court said that that provision "will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable" (93 S. Ct. at 2977).

The discussion of this aspect of entanglement in the *Lemon* decision follows the discussion of administrative entanglement and starts with a statement that this is a "broader base of entanglement" (403 U.S. at 622). We submit that it is broad enough to include all forms of governmental aid to sectarian schools that involve any substantial amount of expenditure of tax-raised funds. That is surely the case here.

Conclusion

The issue in this case is not whether educationally deprived children attending sectarian schools are entitled to aid under Title I. The Missouri authorities have established remedial and other Title I programs in the public schools in which nonpublic school students can participate. Rather, the issue is whether Title I funds can and must be used to conduct such programs on the premises of sectarian schools.

In its opinion in *Nyquist* (93 S. Ct. at 2971-2), this Court referred to a statement in Justice Black's dissenting opinion in the *Allen* textbook case warning that the majority ruling in *Allen* would be used to justify ever-increasing aid to sectarian schools, including construction of buildings and payment of teachers' salaries. The Court said that subsequent rulings by the Court had kept Justice Black's fears from coming to pass. It then said (at 2972):

> But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Justice Black's prophecy.

We respectfully submit that, if this Court reaches the constitutional issue in this proceeding, it should make clear that the Establishment Clause cannot be made to yield to repeated "ingenious" efforts to find ways around its clear language.

Respectfully submitted,

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